

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 59 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

PATEL NANJI BHOVAN DUDHATRA

Versus

PATEL NARAN MITHA SUKHADIYA

Appearance:

MR SURESH M SHAH for Petitioner
MR HA RAICHURA for Respondent No. 1
MR BN RAVAL for Respondent No. 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 05/02/98

ORAL JUDGEMENT

Heard Learned Advocate for the parties. This appeal is against order dated 10.1.91 passed by the Second Extra Assistant Judge, Junagadh allowing the respondent plaintiffs appeal against judgement and decree dismissing the plaintiff's suit, and remanding the case for trial afresh in exercise of power under Order 41 Rule 23 A of Civil Procedure Code.

2. The respondent plaintiff has filed a civil suit in the court of Civil Judge (JD) for possession of land

allegedly forming part of Survey No.35/2 of which he claimed to be exclusive owner of the land admeasuring 4 acres. According to the plaintiff he has purchased the suit land by registered sale deed on 9.3.60 for consideration of Rs.2500/- from heirs of Sandhi Kasam Umar and the defendant has purchased the land adjoining the northern side of the plaintiffs' land bearing Survey No.35/1 about 6 to 7 years prior to the plaintiff. According to the plaintiff, defendant has encroached upon parcel of land admeasuring about 19 gunthas towards the northern side of Survey No.35/2, therefore the present suit for possession and permanent injunction was filed. After the trial suit was dismissed the plaintiff preferred appeal before the lower appellate court. He moved an application under Order 41 Rule 27 for permitting him to lead additional evidence for proving document mark 28/1 and 28/2 which had already been filed by him during the suit proceedings. The court allowed the application under order 41 Rule 27 and in exercise of its power under Order 41 Rule 23 set aside the judgment and decree and remanded the case back to the Trial Court for retrial by the impugned order.

3. The court noticed that it was the duty of the plaintiff to examine Surveyor Shri Kanoria to prove mark 28/1 & 28/2 and both the documents are very useful and material to enable the court to pronounce the judgment. He also opined that document mark 28/1 and 28/2 which have not been brought on record by examining surveyor are necessary to pronounce judgment in a more satisfactory manner and therefore additional evidence is required to be allowed. He was further of the opinion that Order 41 Rule 27 not only recognises the power of the court to call for additional evidence to enable the court to pronounce the judgement but also for any substantial cause which may involve, when court considers in the interest of justice that something remaining obscure should come up so that the Trial court can pronounce judgment in a more satisfactory manner.

4. In my opinion the learned judge has not correctly considered the ambit and scope of court's power in permitting additional evidence in appeal under Order 41 Rule 27 in the context of facts and circumstances of present case. Order 41 Rule 27 envisages three contingencies in which appellate court can allow additional evidence to be let in by either party. The first is where the court, from whose decree the appeal is, has refused to admit evidence which ought to have been admitted. Apparently, this contingency has not arisen in this case inasmuch as plaintiff has never

tendered the evidence which could give an occasion to the Trial court to refuse admitting the same. The second contingency is where a party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree against him was passed. This contingency also obviously does not arise in the present case. Documents marked 28/1 is Hissa Form No.4 and 28/2 is a map of the site prepared at the instance of the plaintiff. These 2 documents were already filed in the Trial court but were not proved. Permission was sought to produce Kanoria, the Surveyer to prove the two documents. It cannot be said, nor it is the case of the plaintiff, that the evidence which he now wants to adduce for proving these 2 documents was not within his knowledge or that even after exercise of due diligence he could not produce it even if it was within his knowledge. The last contingency which empowers the court to permit additional evidence of the appeal is to enable it to pronounce judgement, or for any other substantial cause. The Trial Court has invoked this contingency.

5. Provision of Order 41 Rule 27(b) does not apply merely to permit a defaulting party to fill in the lacunae by producing evidence at appellate stage which had otherwise not been produced in the Trial Court, nor does the necessity of court to require additional evidence for enabling it to pronounce judgement takes within its ambit requirement of court to pronounce judgement in a particular manner. The enabling power under clause (b) of Order 41 Rule 27 cannot be exercised merely to overcome the difficulty of defaulting party indirectly what cannot be done directly under clause (a) and (aa) of the rule. The requirement of the court to enable it to pronounce judgement cannot be equated with enabling a party to produce evidence which he could produce but has failed to produce to prove his case to enable the appellate court to announce judgment, otherwise. Mere fact that party has failed to produced evidence which it could have produced to prove the case set up by it does not amount to a lacunae in evidence. It leads the court to conclusion that party has failed to prove case set up by it, and the court is in a position to announce its judgement on that basis.

5. Reference may be made to decision of Apex Court in The Municipal Corporation of Greater Bombay v/s Lala Pancham and others, reported in AIR 1965 SC Pg.1008. The Court observed that:-

"Under Order 41 Rule 27, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. The power under cl.b of sub/r(1) of Rule 27 of O. 41 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision."

6. The above observations clearly postulates that before the Court comes to the conclusion that certain evidence is needed for pronouncing judgment something more is required to be seen then to find that evidence which the plaintiff could have led during the course of title to prove the documents which he had already filed but has failed to prove the same.

7. The requirement of satisfactory pronouncement of judgment refers to state of affairs where due to obscurity of facts emerging from evidence on record creating doubt about the conclusion to be reached on the basis of material before it. It does not apply to a case where on the basis of material before it, the court can come to clear conclusions about facts proved or disproved or not proved by permitting one of the parties, who has failed to avail of the opportunity, to lead additional evidence to fill in the lacunae left by it in its case at the appellate stage.

8. The learned trial judge in the present case has merely reproduced or paraphrased the words of Sub rule (b) of Order 41 Rule 27 envisaging condition in which power can be exercised, but has not referred to any material on the basis of which it could be said that there was any obscurity about the conclusions to be reached on the basis of material already available on record one way or the other. The order of the learned judge reveals that it required, additional evidence for pronouncing judgment in more satisfactory manner, which bring the case within the scope of 'for any other substantial cause'. Reason for this is stated to be that

documents Mark 28/1 and 28/2 are necessary to be proved for satisfactory pronouncement. How the judgment in the absence of 'facts not proved' will be unsatisfactory, except for the purpose of enabling the Court to reach conclusion, 'otherwise', does not find consideration. Without this nexus mere recital of language of Statute, provide no 'moksha' from the fulfilment of precondition before additional evidence could be permitted at appellate stage. The exercise of discretion under Order 41 Rule 27 (b) in the facts and circumstances of the present case is contrary to ratio laid down by the Apex Court.

9. In the facts and circumstances of the present case, the best that could be said that importance of proving the two documents, which were prepared either on the information furnished by the plaintiff or at his instance was not realised by him during the trial court. Having suffered the adverse findings at trial, he wanted at appellate stage some evidence which he thinks could tilt the decision in his favour. This cannot furnish a ground for additional evidence to be permitted under clause (a) and (aa) of Order 41 Rule 27(1), nor can it be under clause (b) foundation of requirement of court to enable it to pronounce its judgement. It also cannot be said to be some substantial cause for which 'court' requires the same to be produced. Requirement of defaulting party cannot be equated with requirement of court.

10. Reference may be made to the case of Sunder Lal and Son, V. Bharat Handicrafts Private Ltd., reported in AIR 1968 Supreme Court 406 (V 55 C 89), In somewhat like circumstances, as in the present case, a document viz. confirmation slip having a bearing on the outcome of dispute was within possession of A, who did not rely on it and proved before High Court. In appeal before Supreme Court said confirmation slip was sought to be proved by leading additional evidence. The court declined the permission without dilating on the merit of the case whether the consent sought to be proved by producing additional evidence have a bearing on the outcome. The Apex Court said:-

"The document does not prove itself to make out the case that respondent has consented in writing in terms of contract, evidence that the signatures 'M.L.Bahati' was subscribed by the person bearing that name and that he was authorised to confirm that note on behalf of the respondents will be necessary..... We need not dilate upon that question, for we are only

concerned to point out that there is no evidence on the record that the appellants had secured the written consent or authority of the respondents to the contract..... Where the Appellate Court requires any document to be produced or witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court may allow such document to be produced or witnesses to be examined. We do not require additional evidence to be produced in this case to enable us to pronounce judgment, nor do we think that any substantial cause is made out which would justify an order allowing additional evidence to be led at this stage. The document relied upon was admittedly in the possession of the appellants, but they did not rely upon it before the High Court. It was said at the Bar that the importance of the document was not realised by those in charge of the case. We do not think that the plea would bring the case within the expression "other substantial cause" in O.41, R.27 of the Code of Civil Procedure. We therefore decline to allow this additional evidence to be brought on record."

The ratio fully applies to facts of the present case.

11. Notice may also be taken of the decision of Bombay High Court in the case of Mrs.Indira Bhalchandra Gokhale (deceased by LRs) v. Union of India and another, Respondents reported in AIR 1990 Bombay 98, wherein it was held that:

"Under O.XLI, R.27, C.P.C. production of additional evidence whether oral or documentary is permitted only in certain contingencies. The first contingency is that the evidence sought to be produced in the appeal Court is that which the trial Court has refused to admit though it ought to have been admitted. Next, is the contingency where the evidence sought to be produced was not available to the party seeking to produce it notwithstanding the exercise of due diligence by him. The third contingency is the requirement of the Court of appeal for additional evidence so as to enable it to pronounce judgment. Neither of these contingencies is applicable to the present case. Defendants had ample opportunity when the case was before the trial Court to adduce the required evidence. Order XLI, R.27, C.P.C. is not to be taken recourse to merely because a party at the stage of appeal finds that some material which could have tilted the decision in its favour has not been produced but should have been."

I am in respectful agreement.

12. In the aforesaid view of the matter, I am of the opinion, the Trial Judge clearly erred in allowing the application for leading additional evidence under Order 41 Rule 27 in exercise of its power under Sub rule (1) (b). In view of this conclusion, I do not propose to examine issue about correctness of remand of the case for trial do novo when appellate Court permits additional evidence to be led at the appellate stage.

13. Accordingly, this appeal is allowed. The order under appeal is set aside. The judgment and decree passed by the Trial Court is restored. The appeal against the same is restored to be decided afresh in accordance with law and by the lower Appellate Court. No order as to costs.

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